July 1, 2019

Via ECFS

Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: *Regulation of Business Data Services for Rate-of-Return Local Exchange Carriers; Business Data Services in an Internet Protocol Environment; Special Access for Price Cap Local Exchange Carriers* (WC Docket No. 17-144); *Business Data Services in an Internet Protocol Environment* (WC Docket No. 16-143); *Special Access for Price Cap Local Exchange Carriers* (WC Docket No. 05-25); *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. §160(c) to Accelerate Investment in Broadband and Next-Generation Networks* (WC Docket No. 18-141)

Dear Ms. Dortch:

On June 27, 2019, the undersigned, along with Frank Simone and Keith Krom of AT&T; Joseph Cavender of CenturyLink; A.J. Burton of Frontier; Katharine Saunders and Fred Moacdieh of Verizon, and Kristine Fargotstein of USTelecom ("USTelecom Representatives"), met separately with Nirali Patel, Wireline Legal Advisor to Chairman Pai; Arielle Roth, Wireline Legal Advisor to Commissioner O'Rielly; Jamie Susskind, Chief of Staff and Wireline Legal Advisor to Commissioner Carr; and Randy Clarke, Acting Legal Advisor, Wireline and Public Safety to Commissioner Starks. On June 28, 2019, a subset of this group, along with Lauren Huston of USTelecom, met with Travis Litman, Chief of Staff and Senior Legal Advisor to Commissioner Rosenworcel. On July 1, 2019, the undersigned and Kristine Fargotstein of USTelecom spoke on the phone with Terri Natoli and Edward Krachmer of the Wireline Competition Bureau.

During the meetings, the USTelecom Representatives expressed their support for the *Eliminating Unnecessary Regulation of Price Cap Carriers' Transport Services and Facilities* Report and Order on Remand and Memorandum Opinion and Order ("*Draft Transport Order*") that the Commission will consider at its July 10 Open Meeting.[1] The *Draft Transport Order* recognizes that the transport marketplace is competitive and thriving, and, if adopted, grants much needed relief to allow incumbent local exchange carriers ("ILECs") to operate under a regulatory framework that recognizes such competition.

[1] *Eliminating Unnecessary Regulation of Price Cap Carriers' Transport Services and Facilities*, Docket Nos. 16-143, 18-141, Draft Report and Order on Remand, Memorandum Opinion and Order (Draft Rel. June 19, 2019) (*Draft Transport Order*), https://docs.fcc.gov/public/attachments/DOC-358069A1.pdf.

The data and record supported the decision in 2017[2] and the record developed since then provides even more evidence of a competitive BDS transport market that justifies the Commission's deregulatory actions. The USTelecom Representatives offered support for the draft Memorandum Opinion and Order granting partial forbearance from DS1 and DS3 transport unbundling requirements as requested in USTelecom's Petition for Forbearance.[3] However, for the reasons summarized below, the USTelecom Representatives urged the Commission to eliminate the six-month "freeze" of current market conditions[4] and to reduce the transition period from 36 months to 18 months.[5] The USTelecom Representatives also requested a modification of language in the item that inaccurately describes a prior filing as "late filed,"[6] and discussed how the Commission could provide clarity regarding the list of wire centers for which the Commission has provided forbearance.[7]

Eliminate the Unnecessary Six-Month New Ordering Period. The six-month period in which new unbundled network element ("UNE") DS1/DS3 transport service can be ordered is unnecessary and inconsistent with the deregulatory impetus of the *Draft Transport Order*. While a reasonable transition period is appropriate, there is no justification for promoting a new six-month UNE ordering frenzy, which is the likely effect of this provision. Competitive local exchange carriers ("CLECs") have been on notice for 15 months that the Commission could forbear from UNE DS1/DS3 transport. There is no reason to extend this by another six months; nor is USTelecom aware of any specific requests for a six-month new ordering period in the record. The six-month period is particularly unnecessary in this context because it applies to areas where competition *already* exists (wire centers within .5 miles of competitive fiber). This is unlike the six-month freeze the Commission adopted in the 2017 *BDS Order* because there the freeze only applied to end-user channel terminations in competitive counties, and the Commission has traditionally imposed more stringent regulations on end-user channel terminations than transport.[8]

In addition to being inconsistent with the overall deregulatory approach taken in the item, imposing a six-month new ordering period is inconsistent with past precedent. When conducting prior forbearance analyses, the Commission explicitly prohibited the opportunity for new ordering after the effective date of the order.[9] The Commission has also declined to impose a

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[2] *Business Data Services in an Internet Protocol Environment et al*., Report and Order, 32 FCC Rcd 3459 (2017) (*BDS Order*).

[3] Petition for Forbearance of USTelecom – The Broadband Association, WC Docket No. 18-141, (filed May 4, 2018) ("Petition").

[4] *Draft Transport Order* at para. 61.

[5] *Id.*

[6] *Draft Transport Order* at para 59, n.192.

[7] *Id*.

[8] *BDS Order* at 3591, para. 317.

[9] *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S. C.§ 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the*

new ordering period when deregulating transport unbundling in other past decisions, including the seminal 2005 Triennial Review Remand Order ("TRRO").[10] Thus, in addition to being contrary to the purpose of the *Draft BDS Transport Order*, the new ordering period is also inconsistent with past Commission precedent and should be eliminated.

Reduce the Transition Period from 36 Months to 18 Months. Recognizing the need for a transition period for impacted CLECs if the Petition is granted, USTelecom negotiated a reasonable transition at the outset of this proceeding.[11] The 18-month transition period affords CLECs until February 2021 to find alternatives or negotiate a commercial agreement with incumbent carriers. This 18-month transition period, coupled with the 15 months that the Petition will have been pending, provides competitive LECs with nearly three years to prepare for the transition. While some CLECs have indicated a desire for a longer transition, the proposed 18-month period reflects an agreement between the companies that sell and purchase the vast majority of UNEs. Thus, this period reflects a market-based determination of a reasonable transition in an order that is grounded in the benefits of market-based competition. Merely because a handful of companies seek to lock in their below-market rates for as long as they can is no reason to order an extended transition to market-based rates.

Past Commission findings and precedent also support a shorter transition. When the Commission has examined unbundling in the past, it has supported transition periods between 12 and 18 months—if a specified time period was necessary at all. In 2003, when the market was significantly less competitive, the Commission declined to establish a specific transition period for unbundling, but instead "rel[ied] on the timing of the contract modification process" (with the exception of new line sharing arrangements).[12] With respect to dedicated DS1/DS3 transport specifically, in the 2005 TRRO the Commission adopted a 12-month transition period and an 18-month plan to govern transitions away from dark fiber transport.[13] The Commission determined

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Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area, Memorandum Opinion and Order, 22 FCC Rcd 1958, 1960 at para. 2 (2007) (*2007 ACS Forbearance Order*) ("Consistent with the Commission's transition plan in the Qwest Omaha Order, competitive LECs may no longer add new UNEs pursuant to section 251(c)(3) in circumstances where the Commission has determined to forbear from a section 251(c)(3) unbundling requirement.").

[10] *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand*, 20 FCC Rcd 2533, 2613-14 at para. 142 (2005) (*Triennial Review Remand Order*) ("These transition plans shall apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs pursuant to section 251(c)(3) where the Commission determines that no section 251(c) unbundling requirement exists.").

[11] Letter from Jonathan Banks, Senior Vice President, USTelecom, et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (filed June 21, 2018).

[12] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd 16978, 16992 para. 7 (2003) (*Triennial Review Order*).

[13] *Triennial Review Remand Order* at 2613, para. 142 ("Specifically, for DS1 and DS3 dedicated transport we adopt a twelve-month plan for competing carriers to transition to alternative facilities or arrangements, including self-provided facilities, alternative facilities offered by other carriers, or special access services offered by the incumbent LEC. As discussed below, we find it is appropriate to adopt a longer, eighteen-month transition plan for dark fiber transport. These transition plans shall apply only to the embedded

that "the twelve-month period provides adequate time *for both* competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, *including decisions concerning where to deploy, purchase, or lease facilities*."[14] Further, in the 2007 *ACS Forbearance Order*, the Commission found that a 12-month transition period satisfied the three-prong forbearance standard.[15]

In proposing a 36-month transition period in the *Draft Transport Order*, the Commission seeks to draw parallels to the transition periods it applied to transport in the *BDS Order*. However, there are fundamental differences in the effect of the transition from the *BDS Order* versus that of the proposed transition in the *Draft Transport Order*. As applied to transport in the *Draft Transport Order*, incumbent LECs would have their rates locked in place for a firm period of 36 months. In the *BDS Order*, however, incumbent LECs could choose to avail themselves of the full relief provided by the *BDS Order* during the six-month period if they voluntarily withdrew their tariffs during the six-month freeze period.[16] In the *BDS Order*, that transition period was the longest possible time that ILECs were subject to having their rates locked in, whereas in the *Draft Transport Order*, ILECs are forced to have rates locked in for three years.

The flexibility provided in the *BDS Order* made sense given the Commission's findings about the state of competition in the BDS marketplace – findings that are equally relevant in the forbearance context as described below. When examining the market in the *BDS Order*, the Commission was not looking to make sure customers could find an alternative. Instead, the impetus of the *BDS Order* was to show LECs how to adapt their systems to the changing technological world. The Commission's primary concern was how quickly the price cap LECs could get out from under tariffs – and this is because the Commission recognized that the BDS market was highly competitive. Even based on data from 2013, the Commission has not had trouble finding competition in the TDM market.[17] Rather than worry about whether competition over the medium term would constrain pricing, the Commission found competition was "sufficiently widespread" so that price cap LECs could not charge supracompetitive rates over the short-to medium-term.[18] The Commission also found that, "lower entry barriers for

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customer base, and do not permit competitive LECs to add new dedicated transport UNEs pursuant to section 251(c)(3) where the Commission determines that no section 251(c) unbundling requirement exists.") (*Triennial Review Remand Order*).

[14] *Triennial Review Remand Order* at 2614, para. 143 (emphasis added).

[15] *2007 ACS Forbearance Order* at 1960, para. 2 ("Carriers have one year from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. By the end of the one-year period, requesting carriers must have transitioned all of their affected 251(c)(3) network elements to alternative facilities or arrangements.").

[16] *BDS Order* at 3533, para.169 ("Carriers, including non-incumbent LECs, may remove the relevant portions of their tariffs for the affected services at any time during the transition, and the rate freeze does not apply to services that are no longer tariffed.").

[17] *Id.* at 3499, para. 85.

[18] *Id.* at 3502, para. 92.

deploying transport services for end user channel termination services and increasing demand for transport means that regulatory relief will provide incentives for competitive providers to deploy additional transport facilities to compete for [that] demand."[19] These findings in the *BDS Order* make clear that the Commission was not concerned with waiting for the medium term for prices to normalize, and nothing in *BDS Order* indicates that the existence of competition does not *already* adequately constrain pieces.

The findings in the *BDS Order* concerning the state of competition in the transport market are highly relevant in the forbearance context. The Commission determined that "the presence or *reasonable proximity* of a single competitor's facilities represents competition given the high sunk cost nature of the business data services market."[20] The reason that the "reasonable proximity" of competitive fiber is a demonstration of actual competition is simple – it directly affects the behavior of the incumbent carrier who is conscious of the threat of losing business to that competitor.[21] As the Commission noted in the *BDS Order*, "[c]ompetitors outside of the customer's location can affect pricing because the winning bid represents the competitive offer that others must beat, even if that competitor does not already have facilities in the customer's building."[22] As a general matter, the importance of looking beyond actual competitors to potential entrants – that is, those with a realistic prospect and intention of entering a market – is an established component of competitive analysis, as reflected in the DOJ/FTC Horizontal Merger Guidelines,[23] longstanding Commission precedent,[24] and court decisions.[25] That principle is equally relevant in the forbearance context as it is in any rulemaking employing the impairment standard. As the D.C. Circuit observed, "the FCC has consistently considered *both* actual and potential competition in assessing whether a marketplace is sufficiently competitive to warrant UNE forbearance."[26] Moreover, it would make no sense under the statute

[19] *Id.* at 3501-3502, para. 92.

[20] *Id.* at 3501, para. 91 (emphasis added).

[21] *Id.* at 3512-13, para 118.

[22] *Id.* at para. 46.

[23] *See, e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 5.1 (Aug. 19, 2010) ("DOJ/FTC Horizontal Merger Guidelines") (identifying potential competitors as market participants alongside firms that are already producers in a relevant market); *see also* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 423 (4th ed. 2015).

[24] *See, e.g.*, *Special Access for Price Cap Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, para. 80 (2012) (stating that the Commission's "analysis must take account of … potential competition").

[25] *See, e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999) ("The Commission cannot, consistent with the statute, blind itself to the availability of [network] elements outside the incumbent's network.").

[26] *Verizon Tel. Cos. v. FCC*, 570 F.3d 294, 303 (D.C. Cir. 2009) (emphasis in original) (making clear that the forbearance provision in the Act does not mandate a particular form of competitive analysis and that while it may be reasonable for the Commission to consider only evidence of actual competition rather than actual and potential competition, it cannot do so without adequately explaining its decision to ignore potential competition as it had done in the past).

or as a matter of policy for the Commission to apply a higher standard to a forbearance request (an expressly deregulatory act) than it would to an impairment analysis in a rulemaking exploring regulatory relief from unbundling requirements. For these reasons, in addition to being sound policy, the Commission is on solid legal ground if it grants an 18-month extension.

Eliminate an Inaccurate Description of USTelecom's Prior Filing. The *Draft Transport Order* inappropriately refers to a May 6, 2019 filing from USTelecom[27] as "late filed."[28] Under the Commission's forbearance procedural rules, "the Commission will consider further facts and arguments entered into the record by a petitioner (1) in response to facts and arguments introduced by commenters or opponents and (2) by permission of the Commission.[29] There is no time limit on when such facts and arguments may be entered in the record. Opponents clearly introduced new facts and arguments following the initial opposition period, particularly arguments suggesting a negative impact on rural and residential consumers and businesses if forbearance is granted. These arguments were directly refuted by analysis in USTelecom's *May 6 Ex Parte Letter*.[30] Moreover, the *May 6 Ex Parte Letter* included analysis of new data that the Commission itself introduced in the record in April, data on which it sought comment until May 28, 2019.[31] The Commission's rules provide broad discretion for the agency to grant permission for new information to be filed in the record. It defies logic for the Commission to deny USTelecom the opportunity to include new data and analysis in the record in response to new information made available by the Commission. If the Commission's rules allow Petitioners to respond to new facts and arguments introduced by commenters or opponents, it cannot be the case that Petitioners cannot respond to new facts made available by the Commission itself.

Not only would characterizing USTelecom's filing as "late-filed" be incorrect under the Commission's rules, but it would also set a bad precedent. By refusing to consider the alternative proposal included in the *May 6 Ex Parte Letter*, the Commission would be suggesting that while the agency can (and often does) craft less expansive relief than the petitioner originally requested, the petitioner is prohibited from commenting on what a less expansive grant might look like once the very short complete-as-filed window has passed.[32]

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[27] Letter from Patrick Halley, Senior Vice President, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-141 (filed May 6, 2019) (*May 6 Ex Parte Letter*).

[28] *Draft Transport Order* at 28, n.192 (suggesting that the *May 6 Ex Parte Letter* was "late filed").

[29] 47 CFR 1.54. The Commission has determined USTelecom's Petition was "complete-as-filed."

[30] *May 6 Ex Parte Letter.*

[31] *Wireline Competition Bureau Seeks Focused Additional Comment in Business Data Services and USTelecom Forbearance Petition Proceedings and Reopens Secure Data Enclave*, Public Notice, DA 19-281 (WCB Apr. 15, 2019).

[32] This is not to say that the Commission was required to adopt USTelecom's proposal for a grant of forbearance only in areas subject to existing facilities-based competition if nationwide relief for UNEs is not granted. As the *Draft Transport Order* found, the data demonstrates that UNE DS1/DS3 transport is far more prevalent than in existing Tier 1 and Tier 2 wire centers and that there are roughly 11,000 wire centers with nearby competitive fiber. *Draft Transport Order* at para. 59. As it did in footnote 194, the

Provide Clarity Regarding the List of Competitive Wire Centers. Finally, USTelecom Representatives offered a procedural suggestion regarding the list of wire centers that are subject to relief that the Wireline Competition Bureau ("Bureau") is directed to release.[33] To avoid confusion and allow for a complete list, the Commission should make sure the list includes all newly added Tier 2 and 3 wire centers subject to relief and all Tier 1 and Tier 2 wire centers that have previously been granted relief from unbundling requirements. Specifically, the list should include all Tier 1 and Tier 2 offices and all newly added Tier 2 and 3 offices that are within a half mile of fiber. The USTelecom Representatives also discussed whether the list would be dynamic or static since the Commission's analysis is based on 2013 data.

Conclusion. USTelecom supports the *Draft Transport Order.* With the changes requested above, the *Draft Transport Order* will further the Commission's work to modernize outdated regulations to incentivize investment in next-generation networks and services. Please direct any questions to the undersigned.

Sincerely,

/s/ Patrick R. Halley
Patrick R. Halley
Senior Vice President, Policy & Advocacy
USTelecom – The Broadband Association

Commission could have merely relied on its analysis and declined to rely on the *May 6 Ex Parte Letter* – there is no need to characterize the *Ex Parte* as "late-filed."

[33] *Draft Transport Order* at para. 59, n.194.